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# TRANSCRIPT OF RECORD.

## SUPREME COURT OF THE UNITED STATES.

No. ~~291.~~ 94

WILLIAM H. WHITESIDE, RUDE HARRIS, AND DANIEL W. CHANDLER, APPELLANTS,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

**FILED OCTOBER 6, 1874.**

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1 In the United States Court of Claims, December term, A. D. 1871.

WILLIAM H. WHITESIDE, RUDE HARRIS, AND Daniel W. Chandler
*vs.*
THE UNITED STATES.

6398. Filed Dec. 21, 1871. J. R.

The petition of William H. Whiteside, Rude Harris, and Daniel W. Chandler, trading under the firm of Whiteside & Co., citizens of the United States, respectfully shows:

That on the tenth day of November, A. D. 1865, your petitioners, by the name and style of Whiteside & Co., entered into a contract with one Abias B. Miller, then a duly authorized and appointed assistant special agent of the Treasury Department of the United States at Camden, in the State of Arkansas, he, the said Miller, then and there having full power and authority to enter into and make said contract for and on behalf of the United States, whereby it was stipulated, understood, and agreed by and between the parties that the said Whiteside & Co. should proceed to LaFayette County, in said State of Arkansas, and procure evidence sufficient to establish the right of the United States to certain lots of cotton then and there being, and to put the same in shipping order, and to transport or have the same transported to the said

2 town of Camden, in the State of Arkansas, then and there to be delivered over to the said agent. In consideration whereof it was then and there stipulated and agreed by the said Miller, for and on behalf of the said United States, that the said Whiteside & Co. should have and be entitled to one-half interest in all such cotton so procured for or on behalf of the United States, when the same should be condemned. And in all cases where the cotton should be released after seizure thereof, by competent authority, the said Whiteside & Co. to be repaid for all expenses of transportation, repairing, &c. A copy of which said contract is hereto attached, and is marked "A."

And your petitioners aver that after the making of said contract, and in pursuance of its terms, they did afterwards, to wit, in the months of November and December, A. D. 1865, proceed to the place named in said contract, and did procure, repair, gin, bale, and put in order for transportation and for market, and did transport and forward to the said town of Camden, in the State of Arkansas, and then and there did deliver to the said Abias B. Miller, agent of the United States as aforesaid, four hundred and fifty-one bales of cotton, alleged and claimed to have belonged to the United States. And petitioners say they procured evidence to warrant the seizure of said cotton. And the same cotton while so in the care, possession, and custody of the United States, was afterwards, to wit, on or about the first day of January, A. D. 1866, by competent authority of the United States, released to and delivered over to the former owners and claimants of the said four hundred and fifty-one bales of cotton above mentioned and described.

And your petitioners here show and allege that in procuring, putting in order, and transporting said four hundred and fifty-one bales of cotton, they expended the sum of seventeen thousand three hundred and fifty-six dollars; and that the same was a just, fair, and reasonable sum for the services so rendered. And afterwards, to wit, on

3 the 28th day of December, A. D. 1865, at Camden, in the State of Arkansas, the said Abias B. Miller, agent of the United States, did give his receipt, acknowledgement or voucher in writing to these

petitioners for the sum of ten thousand three hundred and fifty dollars, part of the moneys so by them expended in and about the said cotton, which had been then and there released as aforesaid; and which said receipt, writing, or voucher was then and there approved by Oscar H. Burbridge, supervising special agent of the Treasury Department of the United States for the third agency, he then and there having full and competent authority to acknowledge, ratify, and approve the same. A copy of which said voucher, receipt, or acknowledgement is hereto attached as an exhibit, and is marked "B."

And the said Abias B. Miller, agent as aforesaid, afterwards, to wit, on the 10th day of March, A. D. 1866, did give to these petitioners a further receipt. acknowledgement, or voucher for other moneys paid, laid out, and expended by them, the said petitioners, in and about the same cotton, in procuring, repairing, and transporting and delivering the same, to wit, the sum of seven thousand and six dollars; and the same was then and there approved, ratified, and confirmed by Oscar H. Burbridge, supervising special agent of the Treasury Department as aforesaid; the said Miller and the said Burbridge having full and competent and lawful authority to act for and on behalf of the United States in the premises. A copy of which writing or voucher is hereto attached, and marked "C."

Your petitioners therefore claim to have and recover of and from the United States, by virtue of said contract, and the vouchers aforesaid, and the premises herein set forth, the sum of seventeen thousand three hundred and fifty-six dollars.

4 Your petitioners further show that the interest of the petitioners, Rude Harris and Daniel W. Chandler, in the claim, have been released and transferred to the said William H. Whiteside, who is now the sole owner of the claim, and prosecutes the same for his use; and that no other assignment or transfer of the said claim, or any part thereof, or any interest therein, has been made.

That said petitioners, and each of them, are citizens of the United States, and have at all times borne true faith and allegiance to the United States, and have never given any aid or comfort to rebellion against the same, or to the persons engaged therein.

They therefore aver that they are lawfully and justly entitled to have and recover of and from the United States the said sum of seventeen thousand three hundred and fifty-six dollars. And for the same they pray the judgment of this honorable court, and they will pray, &c.

WILLIAM H. WHITESIDE,
*Claimant, Chicago, Illinois.*

BARTLEY & CASEY,
HUGHES, DENVER & PECK,
*Counsel, Washington, D. C.*

DISTRICT OF COLUMBIA, *ss:*

William H. Whiteside, being duly sworn, doth depose and say that the facts set forth in said petition are true, and that no assignment or transfer of said claim has been made except as therein stated, and that he is justly entitled to recover the sum herein claimed, after allowing all just credits and set-offs.

WILLIAM H. WHITESIDE.

Sworn and subscribed before me this 18th day of December, A. D. 1871.

[SEAL.] CHAS. CONS. CALLAN,
*Notary Public.*

5 EXHIBIT A.

OFFICE ASSISTANT SPECIAL AGENT,
TREASURY DEPARTMENT,
*Camden, Ark., Nov.* 10, 1865.

This contract made and entered into by and between A. B. Miller, assistant special agent Treasury Department, and W. H. Whiteside & Co., that said Whiteside & Co. agree to proceed to LaFayette County, Ark., (distant sixty-five miles,) and procure evidence sufficient to establish the right of the Government to certain lots of cotton, and put the same in shipping order and transport to this place, for and in consideration of one-half interest in all cottons so recovered and condemned, and in all cases when the cottons are released, after the seizure being made upon sufficient evidence to warrant the same, said Whiteside & Co. will be repaid for all expenses of transportation, repairing, &c.

A. B. MILLER,
*Assist. Special Agent Treasury Department.*
WHITESIDE & CO.

Witnessed before me this 10th day of November, 1865.
JAS. THOS. ELLIOTT,
*Judge, &c.*

Upon which is the following endorsement:

OFFICE SUP. SPL. AGT., 3D AGENCY, U. S. T.,
*New Orleans, La., March* 28, 1866.

Subject to the approval of the Secretary of the Treasury, the within contract is approved so far as it conforms to the regulation of the Treasury Department for paying one-fourth of the cotton condemned, and it is recommended that one-half of said cotton be allowed.

O. H. BURBRIDGE,
*Sup. Special Agent.*

6 EXHIBIT B.

*The United States Treasury Department to W. H. Whiteside & Co., Dr.*

For the following charges incurred upon cottons under seizure by the United States Government, claimed by C. M. Hervey, viz:

| | |
|---|---|
| Hauling by wagons from Lost Prairie, La Fayette County, Arkansas, to Camden, Arkansas, 225 bales cotton, at $21 per bale | $4,725 00 |
| Baling, new bagging, and rope furnished, and hauling to press 225 bales cotton, at $10 per bale | 2,250 00 |
| Ginning 225 bales cotton, at $15 per bale | 3,375 00 |
| | $10,350 00 |

I certify that the above account is correct and true; that the several sums charged accrued upon this particular lot of cotton as stated, and were necessary for the public service, and were deemed absolutely essential by me to effectuate the seizure made by me of cotton claimed by C. M. Hervey, but in my opinion clearly belonging to the Government.

A. B. MILLER,
*Asst. Sup. Spl. Agent, 3d Agency, Treasury Dept.*

CAMDEN, ARKANSAS, *December 28th*, 1865.

Approved:

O. H. BURBRIDGE,
*Sup. Spl. Agent.*

Received, , of , ten thousand three hundred and fifty dollars, in full of above account.

WHITESIDE & CO.

(Signed in triplicate.)

7 EXHIBIT C.

OFFICE ASSISTANT SPECIAL AGENT TREASURY DEPARTMENT,
*Shreveport, La., March 10th*, 1866.

*The United States Treasury Department to Whiteside & Co., Dr.*

For the following charges incurred upon cotton under seizure by the United States Government, viz:

| | |
|---|---|
| Hauling by wagons from Lost Prairie, La Fayette County, Arkansas, to Camden, Arkansas, 226 bales cotton, at $21 per bale | $4,746 00 |
| Rebaling, new bagging and rope, hauling to press, &c., 226 bales cotton, at $10 per bale | 2,260 00 |
| The above cottons were marked S, and were seized from plantation belonging to "Jones estate." | |
| | $7,006 00 |

I certify that the above account is correct and true, and that whilst in New Orleans, in the month of January, 1866, I certified to a duplicate of this account, but embodied in it was a charge of $5 per bale, information furnished, which was erased on presentation of the account to the Treasury Department.

A. B. MILLER,
*Asst. Special Agent Treasury Dept.*

I certify that the above account is correct and just, and was expended as above stated.

_____,
*Asst. Special Agent Treasury Dept.*

Received , 186 , of A. B. Miller, assistant special agent Treasury Department, seven thousand and six dollars, in full of the above account.

WHITESIDE & CO.

(Signed in triplicate.)

8 In the United States Court of Claims. December term, A. D. 1871.

WM. H. WHITESIDE ET AL.
*vs.*
THE UNITED STATES. } No. 6398. Filed Feb. 20, 1872.

And the said defendants, by their Attorney-General, come and make answer to the petition of the claimant herein; and, not confessing the

same, or any part thereof, deny each and every the allegations therein contained, and call for strict proof of the same.

And as to so much of the said petition as sets forth and avers that the said United States are indebted to the said claimant in the sum of seventeen thousand three hundred and fifty-six dollars, the said defendants say that they are not indebted to the said claimant in the said sum of money, nor any part thereof.

And as to so much of the said petition as avers that the said claimant at all times borne true faith and allegiance to the Government of the United States, and never voluntarily aided, abetted, or given encouragement to rebellion against the said Government, the said defendants deny the said allegation.

WM. McMICHAEL,
*Assistant Attorney-General.*

T. H. W.

9 In the Court of Claims of the United States, Dec. term, 1872.

WHITESIDE & Co.
*vs.*
THE UNITED STATES. } 6398.

The defendants, by their Atty. General, come and say in addition to all other pleas filed herein, and not waiving any of them, that the claimants should not further have or maintain their said suit, because they did not file their petition nor transmit the same to the court within six years from the time their claim first accrued.

Wherefore the defendants ask judgment, &c.

JOHN GOFORTH,
*Asst. Atty. Genl.*

10 In the Court of Claims.

WILLIAM H. WHITESIDE, RUDE HARRIS, AND Daniel W. Chandler
*vs.*
THE UNITED STATES. } 6398.

At a Court of Claims held at the Capitol, in the city of Washington, the 24th day of November, A. D. 1873, judgment was ordered to be entered up as follows:

The court, upon due consideration of the premises, find in favor of the defendants, and do order, adjudge, and decree that the said claimants' petition be dismissed.

By the court.

11 In the United States Court of Claims.

WILLIAM H. WHITESIDE, RUDE HARRIS, AND Daniel W. Chandler
*vs.*
THE UNITED STATES. } No. 6398.

The claimants, by their counsel, hereby appeal to the Supreme Court of the United States from the judgment of dismissal entered in the case.

And they pray that the same may be allowed by the honorable the Court of Claims.

JOS. CASEY,
*Of Counsel for Claimants.*

Filed Feb. 18, 1874.

Ordered, that the appeal be allowed as prayed for.
By the court.

12 United States Court of Claims.

WM. H. WHITESIDE & CO.
*vs.*
THE UNITED STATES
No. 6398.

FACTS.

The claimants seek by their petition to recover $17,356.00, which they aver was expended in the fulfillment of the following contract:

"OFFICE ASSISTANT SPECIAL AGENT,
"TREASURY DEPARTMENT,
"*Camden, Ark., Nov.* 10, 1865.

"This contract, made and entered into by and between A. B. Miller, assistant special agent Treasury Department, and W. H. Whiteside & Co., that said Whiteside & Co. agree to proceed to La Fayette County, Ark., (distant sixty-five miles,) and procure evidence sufficient to establish the right of the Government to certain lots of cotton, and put the same in shipping order and transport to this place, for and in consideration of one-half interest in all cottons so recovered and condemned; and in all cases where the cottons are released, after the seizure, being made upon sufficient evidence to warrant the same, said Whiteside & Co. will be repaid for all expenses of transportation, repairing, &c.

"A. B. MILLER,
"*Assistant Special Agent Treasury Department.*
"WHITESIDE & CO.

"Witnessed before me this 10th day of November, 1865.
"JOS. THOS. ELLIOTT, *Judge, &c.*"

Upon which is the following indorsement:

"OFFICE SUP. SPL. AGT. 3D AGENCY, U. S. T.,
"*New Orleans, La., March* 28, 1866.

"Subject to the approval of the Secretary of the Treasury, the within contract is approved, so far as it conforms to the regulations of the Treasury Department for paying one-fourth of the cotton condemned, and it is recommended that one-half of said cotton be allowed.

"O. H. BURBRIDGE,
"*Sup. Special Agent.*"

During the months of November and December, 1865, the claimants so far carried out this contract as to deliver to A. B. Miller, assistant special agent Treasury Department at Camden, Arkansas, the following lots of cotton, viz:

225 bales, known as the Harvey cotton.

71 bales, known as the Thomas Trigg cotton.
226 bales, known as the Jones cotton.

13 These several lots of cotton were stored in the Camden warehouse, at Camden, Arkansas, and, on or about the 9th of January, 1866, the Harvey cotton, 225 bales, and the Jones cotton, 226 bales, were forcibly taken possession of by order of General May, then commanding the Ouachita River district, headquarters at Camden, Arkansas, and turned over to C. M. Harvey, as the lawful owner thereof.

For the transportation of these lots of cotton, which were hauled about seventy or eighty miles, the claimants have not been paid as provided by the written contract.

For this service two vouchers were made out and delivered to the claimants, as follows:

For the following charges, incurred upon cotton under seizure by the United States Government, viz:

| | |
|---|---|
| Hauling by wagons from Lost Prairie, La Fayette County, Ark., to Camden, 226 bales cotton, at $21 per bale | $4,746 00 |
| Rebaling, new bagging, and rope, hauling to press, &c., 226 bales cotton, at $10 per bale | 2,260 00 |
| Total | 7,006 00 |

For the following charges, incurred upon cottons under seizure by the United States Government, claimed by C. M. Hervey, viz:

| | |
|---|---|
| Hauling by wagons from Lost Prairie, La Fayette County, Ark., to Camden, Ark., 225 bales cotton, at $21 per bale | $4,725 00 |
| Bailing, new bagging and rope furnished, and hauling to press, 225 bales cotton, at $10 per bale | 2,250 00 |
| Ginning 225 bales cotton, at $15 per bale | 3,375 00 |
| Total | 10,350 00 |

Both these accounts are certified in the usual form by A. B. Miller, as assistant supervising special agent third agency, Treasury Department, and approved by O. H. Burbridge, supervising special agent.

Neither of these accounts appears to have been presented to the Treasury Department for payment, nor do either of them bear any date.

It further appears in proof that the Secretary of the Treasury, on the 14th of December, 1865, telegraphed to General Day, who was under the command of Major-General Reynolds, to furnish no military aid in men or transportation to guard or collect any cotton not included in the classification given by the Secretary, and to withdraw at once all guards not required by these instructions.

The instructions referred to were of the same date, and given to Major-General Reynolds, commanding the department, and are as follows:

"Agents are instructed to take only cotton on confederate lists as its property, or other cotton shown to be such, and that belonging to blockade-running companies. If any agent does more than this, he transcends his authority; and I will thank you to apply such remedy as you can to stop the abuse.

"HUGH McCULLOCH,
"*Secretary Treasury.*"

General May, acting under these instructions and the order of his superior, Major-General Reynolds, under date of January 4, 1866, di-

recting him to carry out his own decision, and to put the owners in possession of their cotton, did, after examination, as before
14 shown, put Hervey in possession of 225 bales of the cotton seized, against the protest of Miller, the assistant supervising special agent.

And upon the foregoing findings of fact, the Court of Claims decides as—

CONCLUSIONS OF LAW.

I. That the contract relied on by the claimant, not being approved by the supervising special agent of the Treasury, was incomplete, and no benefit having resulted to the Government from its alleged fulfillment, there is no legal or equitable ground for recovery.

II. That if the contract was valid the loss to the claimant was caused by the illegal seizure of General May, and for that the Government is not liable.

The grounds for these conclusions are fully set forth in the following opinion:

15 MILLIGAN, J., delivered the opinion of the court:

The validity of the contract on which this action is founded is called in question by the Assistant Attorney-General, for want of authority at its date, in the assistant special agent of the Treasury, to bind the United States in such contract. It might be interesting to trace the power of such agents, and to determine the limit of their authority, from time to time, under the rules and regulations of the Treasury Department; but this can scarcely be necessary in the view we have taken of this case.

It is proper, however, in passing, to say that the authority of the agent is claimed under Article XII of the Treasury regulations of September 11, 1865; and denied under the circular letters of the Secretary of the Treasury of the 27th of June and the 22d of July following.

But without deciding this question, it may be assumed, for the purposes of this case, that the assistant special agent, with the approval of the supervising agent at New Orleans, had the lawful authority to make the contract set forth at length in the findings of the court. But do the papers set out and relied on as the foundation of this suit constitute a valid and completed agreement, such as this court can enforce? If the contract is incomplete, the work performed under it was without authority, and the Government is responsible only to the extent of the benefit conferred.

The paper brought into court and filed by the claimants, as the contract under which they acted, bears date the 10th of November, 1865; and although they appear to have acted under it, its validity is made contingent on the approval of the supervising special agent at New Orleans. He does approve it, but long after the cotton was brought in under it, and subject to the approval of the Secretary of the Treasury, which is not shown in this record ever to have been obtained.

The condition on which the claimants have made the contract to depend has never been fulfilled, either actually or constructively. Had the cotton been sold and the proceeds paid into the Treasury, it might be regarded as a recognition of the contract under which *I* was collected, and a constructive ratification thereof. But this was not even done, or prevented from being done by any authorized act of the Government.

The contract being incomplete, and no benefit resulting to the United States from its alleged fulfillment, there is no legal or equitable right of recovery.

Coupled with this view of the case, another and perhaps more serious question arises out of the facts. The act of March 12, 1863, and the regulations of the Treasury made pursuant thereto, contemplate that each lot of captured or abandoned cotton collected and sold by the special agents should, as near as practicable, be made to bear the expenses incurred in its collection and sale; and when it once reached the hands of the agents, their duty was to appropriate it to public use on due appraisement and certificate, or to forward it to a place of sale, there to be sold to the highest bidder, and the proceeds paid into the Treasury. General May, after it reached the hands of the Treasury agent, had no lawful power to wrest it out of his hands and to turn it over to the lawful owner. His act in doing so (although evidently prompted by the purest motives) was arbitrary and unlawful; and on that account the United States, on well-settled principles, are not an-
16 swerable for it. (Vanpelt & Co., 6 Ct. Cls. R., p. 103; Spencer's case, (present term;) Story on agency, § 307.)

The unlawful act of General May constitutes the real and only breach of the contract complained of, and the Government being in no way responsible for it, cannot be held liable for the services rendered under the alleged agreement, which conferred no benefit whatever upon the United States.

On general principles, if the contract, on further examination, should turn out to be valid under the rules and regulations of the Treasury Department, General May might be held responsible to the claimant; but he is probably protected by the act of July 27, 1868.

The vouchers resting on the alleged contract must fall with it.

Petition dismissed.

17 In the Court of Claims.

WILLIAM H. WHITESIDE, RUDE HARRIS, AND Daniel W. Chandler
*vs.*
THE UNITED STATES. } No. 6398.

I, John Randolph, assistant clerk of the Court of Claims, do hereby certify that the foregoing are true transcripts of the pleadings in the above-entitled cause, and the final judgment of the court thereon; of the application of the solicitor of the claimants for the allowance of an appeal, as filed in the clerk's office February 18, 1874, and of the order of the court allowing the same; of the findings of fact by the court and conclusions of law thereon, on which the court founded its judgment, and of the opinion of the court.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at Washington, this fifth day of October, A. D. 1874.

[SEAL.] JOHN RANDOLPH,
*Asst. Clerk Court of Claims.*

(Indorsement on cover:) No. 291. William H. Whiteside, Rude Harris, & Daniel W. Chandler, appellants, vs. The United States. Court of Claims. Filed 6th October, 1874.

REC. 291—2

# Supreme Court of the United States.

OCTOBER TERM, 1876.

*No. 94.*

WILLIAM H. WHITESIDE,
RUDE HARRIS, and
DANIEL W. CHANDLER, } APPELLANTS,

*vs.*

THE UNITED STATES.

## APPEAL FROM THE COURT OF CLAIMS.

BRIEF OF APPELLANTS.

JOSEPH CASEY,
*Of Counsel.*

*Judd & Detweiler, Printers.*

# Supreme Court of the United States.

## OCTOBER TERM, 1876.

*No. 94.*

WILLIAM H. WHITESIDE, RUDE HARRIS and DANIEL W. CHANDLER, Appellants,

*vs.*

THE UNITED STATES.

## APPELLANTS' BRIEF.

### STATEMENT OF THE CASE.

The claimants in the court below, and appellants here, in November, 1865, were resident in the State of Arkansas. On the tenth of that month, they entered into the contract set out on page 3 of the Record with A. B. Miller, a Treasury agent, at Camden, in that State.

The Government alleged that certain cotton in the possession of men by the names of Harvey, Baker, Trigg and Jones, was Confederate cotton, or had been sold by the owners to the Confederacy. The agent, to obtain possession of it for the United States, entered into the contract in question. The cotton was situated in the interior, about eighty miles from Camden, and had to be transported thither, in wagons, over the roads of Arkansas, in the condition in which the war had left them.

The cotton the claimants found in a condition to require re-baling. This they had done at their own ex-

pense. Two hundred and twenty-five bales of the cotton was in the seed, and they had it ginned and baled, and all of it hauled to Camden, for shipment by the river. The cotton was all delivered in good order, to the Treasury agent at Camden. While it was in his possession there, it was seized and taken from him in an arbitrary manner, by force, by General Dwight May, who was acting in a subordinate military capacity in that district. The parties to whom it was delivered, it is a great matter of doubt whether they had any right to it. At all events, it had been ginned, baled and hauled for them to the proper place of shipment, at great expense; and anybody, but a very arbitrary military man, would have required the re-payment of these proper expenses before delivering it over even to an undoubted owner.

General May, to make his little brief authority more conspicuous, refused even to do this. Seventy-one bales of the cotton was shipped to the supervising agent, at New Orleans, and we infer was sold by him, with other lots, and the money paid into the Treasury of the United States.

These claimants only claimed to be re-imbursed the actual outlays and expenses incurred by them in preparing and bringing in and delivering over the cotton to the agent. Their accounts for that service having been submitted to, audited and allowed by the agent with whom the contract was made, and under whose eye the service was rendered.

The Court of Claims held,—

1st. That the contract was not binding on the United States because the agent had not authority to make it.

2d. That the act of General May in releasing the cotton was illegal and unauthorized, and therefore the United States was not liable to the claimants, for the services rendered in relation to such cotton.

ERRORS ASSIGNED.

1st. The Court of Claims erred in deciding that the United States were not bound by the contract given in evidence.

2d. That Court erred also in holding that the claimants could not recover the expenses incurred by them in securing and transporting the cotton.

3d. The Court also erred in holding that the United States were discharged or relieved from liability by the subsequent illegal and arbitrary acts of their own military officer.

ARGUMENT.

Miller, who entered into this contract, was a lawful agent of the United States, appointed under the authority of the act of March 12, 1863, (§§ 1 and 2, 12 Stat., p. 820.)

"That it shall be lawful for the Secretary of the Treasury, from and after the passage of this act, as he shall from time to time see fit, to appoint a special agent or agents to receive and collect all abandoned or captured property in any State or Territory, or any portion of any State or Territory, of the United States, designated as in insurrection against the lawful Government of the United States by the proclamation of the President of July 1, 1862: *Provided*, That such property shall not include any kind or description which has been used, or which was intended to be used, for waging or carrying on war against the United States, such as arms, ordnance, ships, steamboats, or other water-craft, and their furniture, forage, military supplies, or munitions of war."

SEC. 2. "That any part of the goods or property received or collected by such agent or agents may be appropriated to public use on due appraisement and certificate thereof, or forwarded to any place of sale within the loyal States, as the public interests may require; and all sales of such property shall be at auction to the highest bidder, and the proceeds thereof shall be paid into the Treasury of the United States."

In the circular issued July 3, 1863, by the Secretary of the Treasury, the following instructions to the agents occur.

*Where property is liable to be lost or destroyed in consequence of its location being unknown to the special agents, and from other causes, and parties propose for compensation to collect and deliver it into the hands of the agents of this Department, at points to be designated by them, you may contract for the collection and delivery thereof, on the best possible terms, not exceeding twenty-five per cent. of the proceeds of the property; which percentage must be full compensation for all expenses of whatever character incurred in collecting, preparing, and delivering such property at the points indicated. Prior to any contract being entered into, each party proposing must submit, in writing,* a statement, as near as may be, giving the kind and amount of property proposed to be collected, the location whence to be obtained, and all the facts and circumstances connected with it, particularly as to its ownership; and any contract made in pursuance of this authority will be restricted either to the collection and delivery of particular lots at named localities, which is preferred, or, when circumstances clearly justify, to the general collection and delivery of all abandoned property in limited districts, not greater in any case than one parish or county, and not more than one district to be assigned to one contractor.

Before payment to any contractor for services in fulfillment of any contracts made in pursuance of this authority, a bond equal to the amount stipulated to be paid must be given by him, indemnifying the United States against all claims to the property delivered on account of damages by trespass or otherwise, occasioned by the act or connivance of the contractor, and against all claims that may arise on account of expenses incurred in the collection, preparation, and transportation of said property to the points designated in such contract.

Should cases arise justifying, in your opinion, the allowance of a larger percentage than that herein authorized, you will refer such cases to this department, accompanied by a statement of the facts and circumstances connected therewith, together with such views and opinions of your own as you may think proper to submit for my consideration.

Reprint Regulations, pp. 59, 60.

The regulations made on the 11th of September, 1863, in the fourth article, contain the following:

IV. These regulations, and the local rules prescribed by the several supervising special agents for their respective agencies, will be carried into effect by assistant special agents, local special agents, and agency aids. Local special agents will take the place and perform the duties of the boards of trade heretofore authorized. Assistant special agents will be appointed by the Secretary of the Treasury; local special agents and agency aids will be appointed by the supervising special agents, or assistant special agents, as under regulation XXX, subject to the approval of the Secretary.

Reprint of Rules and Regulations, &c., article 4th, of September 11, 1863, p. 65.

Regulations for agents under captured and abandoned property act, made September 11, 1863, section 12, Reprint, p. 86, contains the following:

SUPERVISING SPECIAL AGENTS MAY CONTRACT FOR COLLECTING AND DELIVERY OF PROPERTY BY OTHER PARTIES.

XII. When property is liable to be lost or destroyed in consequence of its location being unknown to the special agents, or from other causes, and parties propose, for compensation, to collect and deliver it into the hands of such agents at points designated by them, supervising special agents may contract, on behalf of the United States, for the collection and delivery to them of such property in their respective agencies, on the best possible terms, not exceeding twenty-five per cent. of the proceeds of the property, which percentage must be full compensation for all expenses, of whatever character, incurred in collecting, preparing, and delivering such property at the points designated. Prior to any such contract being made the party proposing must submit in writing a statement of the kind and amount of property proposed to be collected, the locality whence to be obtained, and all the facts and circumstances connected with it, particularly as to its ownership. And any contract made in pursuance of this regulation must be in writing,

and restricted to the collection and delivery of particular lots at named localities, or, when circumstances clearly justify it, to the general collection and delivery of all abandoned property in limited districts not greater in any case than one parish or county, and not more than one district to be assigned to one contractor.

Also, the following part of section XIV:

XIV. Supervising special agents will pay, or cause to be paid, out of the general fund arising from the sale of all property collected and received in their respective agencies, all expenses necessarily incurred in collecting, receiving, securing, and disposing of the same, including fees, taxes, freights, storage, charges, labor, and other necessary expenses, being careful to avoid all useless or indiscreet expenditures; and will charge each particular lot or parcel with the specific or proportionate amount of all such expenses as can be made specific or proportionate charges to each lot or parcel.

In the circular letter of June 27, 1865, issued by the Secretary of the Treasury, "relative to commercial intercourse, captured, abandoned, and confiscable property, freedmen," &c., the following is contained:

3. Agents for the purchase of products of insurrectionary States on Government account will close their official business, east of the Mississippi, with the transactions of the 13th instant; and west of it, with the transactions of the 24th instant; returning to sellers all property or money received or collected since those dates, respectively, and using such dispatch in the premises that their connection with the Department may, if possible, terminate with the 30th instant.

4. Officers of this Department charged with the duty of receiving and collecting, or having in their possession or under their control captured, abandoned, or confiscable personal property, will dispose of the same, in accordance with regulations on the subject heretofore prescribed, at the earliest time consistent with the public interests, and will refrain from receiving such from military or naval authorities

after the 30th instant. This will not be construed, however, as interfering with the operations of the agents *now* engaged in receiving or collecting the property recently captured by or surrendered to the forces of the United States, whether or not covered by or included in the records, &c., delivered to the United States military or Treasury authorities, by rebel military officers or cotton agents. Those so acting will continue to discharge the duties thus imposed until such property is all received or satisfactorily accounted for, and until the amount so secured is shipped or otherwise disposed of under the regulations on the subject heretofore prescribed. And they will use all the means at their command, with the utmost vigor, to the end that all the property so collected, captured, or turned over shall be secured to the United States with the least possible cost and delay.

Reprint Treasury Regulations, pp. 137, 138.

The seventh section of the rules promulgated by the Secretary of the Treasury on the 18th of August, 1865, is as follows:

7th. Each assistant agent will be assigned to duty in a well-defined district by the proper supervising agent, and will therein make contracts, in all cases where it can be done, with the planter or other person in whose custody the captured cotton shall be found, to prepare in proper packages and condition for transportation, and deliver the same at such place of shipment as shall be agreed upon.

The terms of these contracts, when made with planters having custody of the cotton, should be sufficiently liberal to insure fair compensation to them, and to encourage good feeling on their part. Each contract must be made in writing, and be for the delivery of a specific lot at a designated place, and be made subject to the approval of the supervising agent under whom he is acting. Compensation must be made under such contracts out of the cotton delivered upon them, and must be made only by the supervising agent who receives the cotton.

Reprint of Rules and Regulations, p. 150.

Letters of instruction by the Secretary of the Treasury to the agents appointed under the act of March 12, 1863:

TREASURY DEPARTMENT, *October* 20, 1865.

SIR: I have received your letter of the 10th instant calling my attention to the subject of collecting cotton which was subscribed to what was known as the "Produce Loan of the Confederate States," and giving me your general views in relation to it.

The Department does not concur fully in the views entertained by you. The rule it has adopted is, that where the descriptive lists of property owned by the late so-called Confederate States, captured from or surrendered by its military or civil agents, show property owned or controled by it, such property, if found as stated, should be collected and forwarded by agents of this Department, leaving all questions of right, title, or value of consideration received, to be adjusted by the Court of Claims, to which claimants of said property are referred by the act of Congress on the subject. The same rule will be regarded as also applying to any property which had been owned or controlled by the late so-called Confederate States Government, or which was used, or intended to be used by that organization, or by an organization of private individuals co-operating with it for the purpose of carrying on war against or overthrowing the Government of the United States, even though such property may not have been included in or covered by the descriptive lists above referred to. In taking charge of property of this class great care and discretion should be used by agents, to the end that the rights of individuals be not interfered with, or the property of unoffending persons taken from them.

* * * * * * * *

Very respectfully,

HUGH MCCULLOCH,
*Secretary of the Treasury.*

JOSEPH R. DILLON, Esq.,
*Supervising Special Agent.*

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TREASURY DEPARTMENT, *November* 21, 1865.

*To all Supervising Special Agents:*

For the information and government of officers of the Treasury Department connected with the collection of cap-

tured and abandoned property, the following rules are prescribed, and will be promptly and fully carried out:

1. Hereafter no cotton claimed or recorded by the late so-called Confederate States Government as "tithe cotton" or taxes, and which has not been delivered to it or its agents, but remains in the hands of the person assessed, will be taken or collected as captured property.

2. In no case can the title given by or derived from the late so-called Confederate States Government be regarded as valid by officers of this Department; and cotton in the possession of, or claimed by persons under any sale or transfer made by such government will be treated as captured property, belonging to the United States.

3. In cases where cotton formerly belonging to the so-called Confederate Government has been purchased, and is held by persons alleging that the same was purchased for the purpose of delivering it to agents of this Department authorized to purchase the products of insurrectionary States on Government account, in pursuance of contracts made with such agents, it will be taken by agents of this Department and treated as captured property.

Persons claiming such property will be advised that upon presenting to the Secretary of the Treasury any claims they may have in the premises, contracts made by them with the purchasing agents will be respected, and parties who have acted in good faith in the execution of such contracts will be protected.

4. Hereafter agents forwarding captured cotton will take measures to insure the same while in their possession or in transit from the place of shipment to New York, being careful to make such insurance in reliable companies, and on the most favorable terms possible to Government.

5. In cases where agents have been appointed since the 18th of August last, or shall be hereafter appointed, the commissions of such new agents shall not extend to cotton collected and stored by their predecessors.

Supervising special agents will see that these instructions are at once communicated to all persons acting under and with them, and strictly complied with.

HUGH MCCULLOCH,
*Secretary of the Treasury.*

TREASURY DEPARTMENT, *January* 23, 1866.

SIR: I have received your letter of the 9th instant relative to my telegram of the 8th, directing that "all cotton voluntarily subscribed" (to the so-styled Confederate States Government) "should be collected wherever found," and note your inquiries and suggestions on the subject.

In the view of the matter taken by the Department, it is held that the act of a person in selling or subscribing property to the insurgent organization is a dedication of it to the purposes of the rebellion, to be used in subverting and overthrowing the lawfully constituted Government, whereby it is forfeited thereto, and the title lost to the person so selling or subscribing; and it is not considered that any subsequent payment of money in satisfaction of such a subscription of property will remove the taint or forfeiture so attaching. The property itself is offending, and should be taken wherever found.

The United States does not base its claim to such property as the assignee or successor-in-law of the so-styled Confederate States Government. In fact, this Government denies that the organization, as a government or body-corporate, could lawfully acquire, possess, or convey any description of property. As an established Government, the United States, under the law of nations and the acts of Congress, has the right to seize and apply to its benefit all property which was used to subvert its authority, or which has been voluntarily contributed or dedicated to such use or purpose by the owner.

On this theory you will act as directed in my telegram above referred to, and direct the action of those under you accordingly, and you and they will be sustained therein by the Department.

Very respectfully,

HUGH MCCULLOCH,
*Secretary of the Treasury.*

WILLIAM P. MELLEN, Esq.,
*General Agent of the Treasury Department,*
*New Orleans, La.*

Reprint of Rules and Regulations, pp. 152, 153.

From the provisions of the act, and the rules and regulations made in pursuance of it, scarcely a doubt can exist of the clear and ample authority of the agent to make a contract for securing this cotton. Whether he could make a contract for one half, under the circumstances, is not a question here; or whether the written contract may be enforced at all is immaterial.

If the agent believed that it was Confederate cotton, or had been sold or pledged to the Confederate Government, it was clearly his duty to have it seized and brought in and have that matter tested, and he had all the power and authority necessary to enable him to perform, fully and efficiently, that duty.

But even if the written contract was not valid or binding for want of some formality, yet the claimants rendered the services and made the expenditure for the United States, at the instance of an officer charged with that business. The cotton was delivered to, received, and accepted by the United States agent. Suppose it had been stolen from the agent, or destroyed by fire while in his possession, would either absolve the United States from paying the claimant for his services and outlays? Such a proposition would be absurd; but it is much more reasonable than that the arbitrary, unreasonable and illegal act of another public officer should absolve the United States from its obligations.

Where the authority of a public agent is limited strictly by statute, the contractor is affected by any want of power to make the particular contract.

But where there is a discretion, in the officer making the contract, or in a superior under whom he is acting, the party dealing with him in good faith, may assume that the discretion is properly exercised.

See 9 Ct. of Cl. Rep., 187, Thompson *vs.* The United States.

If the written contract is invalid he may recover on the implied after delivery or performance.

Salomon's Case, 19 Wall., 17.

Gill's Case, 20 *Id.*, 517.

Reeside's Case, 7 Ct. of Cl., 82, affirmed in the Supreme Court.

Respectfully submitted,

JOS. CASEY,
*Of Counsel for Appellants.*

# United States Supreme Court.

OCTOBER TERM, 1876.

## W. H. WHITESIDE ET. ALS.

**Appellants,**

*VS.*

## THE UNITED STATES.

No. 94.

## Appeal from the Court of Claims.

**ARGUMENT FOR APPELLANTS,**

BY C. F. PECK,

*Attorney for Appellants.*

WASHINGTON, D. C.
GIBSON BROTHERS, PRINTERS.
1876.

IN THE

# Supreme Court of the United States.

October Term, 1876.

WILLIAM H. WHITESIDE ET ALS.,
APPELLANTS,
*vs.*
THE UNITED STATES, APPELLEE.

*No.* 94.

Appeal from the Court of Claims.

*Brief of* C. F. PECK *for Appellants.*

## STATEMENT OF THE CASE.

This was an action brought in the Court of Claims to recover for services rendered to the United States and expenses incurred in securing, putting into proper condition, and transporting certain lots of cotton which were delivered to and taken possession of by a Treasury agent under the acts of Congress relating to captured and abandoned property.

There was an express written contract, in the following terms:

"OFFICE ASSISTANT SPECIAL AGENT,
"TREASURY DEPARTMENT,
"CAMDEN, ARK., *Nov.* 10, 1865.

"This contract, made and entered into by and between

A. B. Miller, assistant special agent Treasury Department, and W. H. Whiteside & Co., that said Whiteside & Co. agree to proceed to Lafayette county, Arkansas, (distant sixty-five miles,) and procure evidence sufficient to establish the right of the Government to certain lots of cotton, and put the same in shipping order and transport to this place, for and in consideration of one-half interest in all cottons so recovered and condemned; and in all cases where the cottons are released after the seizure being made, upon sufficient evidence to warrant the same, said Whiteside & Co. will be repaid for all expenses of transportation, repairing, &c.

"A. B. MILLER,
"*Assistant Special Agent Treasury Department.*
"WHITESIDE & CO.

"Witnessed before me this 10th day of November, 1865.
"JAS. THOS. ELLIOTT,
"*Judge, &c.*"

Upon which is the following endorsement.

"OFFICE SUP. SP'L AG'T 3D AGENCY, U. S. T.,
"NEW ORLEANS, LA., *March* 28, 1866.

"Subject to the approval of the Secretary of the Treasury, the within contract is approved so far as it conforms to the regulation of the Treasury Department for paying one-fourth of the cotton condemned; and it is recommended that one-half of said cotton be allowed.

"O. H. BURBRIDGE,
"*Sup. Special Agent.*"

The finding of facts shows (Record, pp. 6, 7) that during the months of November and December, 1865, the claimant delivered certain lots of cotton to the Treasury agent, and that he incurred heavy expenses in the matter, for which two vouchers were given him by the agent.

The cotton was subsequently restored to its original owners by the act of certain military officers, but against the protest of the Treasury agent.

It was to recover these expenses that the action was brought.

## Assignment of Errors.

1st. The court below decided as its conclusions of law that the contract was incomplete, and therefore not binding, by reason of its not having been approved by the Supervising Special Agent of the Treasury.

2d. That there could be no equitable ground of recovery upon an implied contract for the value of the services actually rendered because no benefit finally resulted to the United States from the acts of the claimant, the fruits of the seizure having been lost by the release of the property through the illegal action of the military officers.

3d. That if the contract were legal and had been performed by the claimant, he could not recover, because the loss was the result of the illegal act of those who released the cotton.

We allege as errors that each of these propositions were erroneously decided by the Court of Claims.

## Argument.

The right of the claimant to recover must be considered under two aspects.

*First.* Under the written agreement, which we affirm to be binding.

*Second.* Under the implied contract to pay the expenses and the reasonable value of the services rendered.

### I.

The general power of the Treasury Department to make such a contract as this was at the time ample and undoubted. Its object was to secure to the United States the possession of certain cotton which it was entitled to take and hold under the acts of Congress relating to abandoned and captured property.

Soon after the commencement of the civil war Congress passed several acts authorizing the seizure and forfeiture of the property of those persons who should take part in the rebellion. The most important of these were the act approved July 13, 1861, (Stat.-at-Large, vol. xii, p. 257,) generally known as the non-intercourse act, and that approved July 17, 1862, (Stat.-at-Large, vol. xii, p. 589,) generally known as the non-intercourse act.

These acts required judicial condemnation of the property seized, and were directed against individuals who participated in the rebellion, rather than against any particular species of property.

Subsequently Congress took a step in a different direction by the passage of the act approved March 12, 1863, and generally known as the abandoned and captured property act. (Stat.-at-Large, vol. xii, p. 820.) The only portions of the act which have any bearing on this discussion are the first, second, third, and sixth sections, which are as follows:

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That it shall be lawful for the Secretary of the Treasury, from and after the passage of this act, as he shall from time to time see fit, to appoint a special agent or agents to receive and collect all abandoned or captured property in any State or Territory, or any portion of any State or Territory, of the United States, designated as in insurrection against the lawful Government of the United States by the proclamation of the President of July first, eighteen hundred and sixty-two: *Provided*, That such property shall not include any kind or description which has been used, or which was intended to be used, for waging or carrying on war against the United States, such as arms, ordnance, ships, steamboats, or other water craft, and the furniture, forage, military supplies, or munitions of war.

"SEC. 2. *And be it further enacted*, That any part of the goods or property received or collected by such agent or agents may be appropriated to public use on due appraisement and certificate thereof, or forwarded to any place of sale within the loyal States, as the public interests may require; and all sales of such property shall be at auction to the highest bidder, and the proceeds thereof shall be paid into the Treasury of the United States.

"SEC. 3. *And be it further enacted*, That the Secretary of the Treasury may require the special agents appointed under this act to give a bond, with such securities and in such amount as he shall deem necessary, and to require the increase of said amounts, and the strengthening of said security, as circumstances may demand; and he shall also cause a book or books of account to be kept, showing from whom such property was received, the cost of transportation and proceeds of sale thereof. And any person claiming to have been the owner of any such abandoned or captured property may, at any time within two years after the suppression of the rebellion, prefer his claim to the proceeds thereof in the Court of Claims; and on proof to the satisfaction of said court of his ownership of said property, of his right to the proceeds thereof, and that he has never given any aid or comfort to the present rebellion, to receive the residue of such proceeds, after the deduction of any purchase-money which may have been paid, together with the expense of transportation and sale of said property, and any other lawful expenses attending the disposition thereof."

* * * * * * * * *

"SEC. 6. *And be it further enacted*, That it shall be the duty of every officer or private of the regular or volunteer forces of the United States, or any officer, sailor, or marine in the naval service of the United States upon the inland waters of the United States, who may take or receive any such abandoned property, or cotton, sugar, rice, or tobacco, from persons in such insurrectionary districts, or have it under his control, to turn the same over to an agent appointed as aforesaid, who shall give a receipt therefor; and

in case he shall refuse or neglect so to do, he shall be tried by a court-martial, and shall be dismissed from the service, or, if an officer, reduced to the ranks, or suffer such other punishment as said court shall order, with the approval of the President of the United States."

The defects of this act were, that it was by no means clear what descriptions of property it referred to. The terms abandoned and captured were not defined. The former was a somewhat novel expression used in this connection, and the term captured property, after the exclusions of the proviso to the first section, could have but little application to hostilities on land. The sixth section of the act seemed to imply that it was especially directed against the staple products of the South, viz., cotton, sugar, rice, and tobacco, and authorized these to be seized, sold, and the proceeds to be paid into the Treasury, leaving the rights of the claimants to be adjusted afterwards.

That this was not intended as a strictly military or war measure is clearly shown by a subsequent enactment, which provided that there should be included in its operations all property confiscable under the acts before referred to:

"That the first section of the 'Act to provide for the collection of abandoned property, and for the prevention of fraud in insurrectionary districts in the United States, approved March twelve, eighteen hundred and sixty-three, is hereby extended so as to include the descriptions of property mentioned in an act entitled 'An act further to provide for the collection of duties on imports, and for other purposes,' approved July thirteen, eighteen hundred and sixty-one, and an act entitled 'An act to suppress insurrection, to punish treason and rebellion, to seize and confiscate the property of rebels, and for other purposes,' approved July seventeen, eighteen hundred and sixty-two, respectively."

U. S. Stat.-at-Large, vol. 15, p. 376.

The Treasury agents therefore became chargeable with the duty of seizing and disposing, not only of all abandoned and captured property, but, in addition, all property confiscable under the acts of Congress just cited.

It cannot be pretended that the Government had no power to seize the property of rebels for confiscation after hostilities had ceased. In fact, it was only after resistance had ended that such seizures were in many cases possible.

The act of July 17, 1862, was particularly sweeping in its operation. It probably included nineteen-twentieths of all the property in the South. But one of its sections suggested, rather than authorized, the mitigation of its severity, by means of Executive clemency.

At the time of these transactions, viz., in November and December, 1865, many of the Southern people had obtained complete amnesty. There were, however, fourteen classes of persons who had been excepted from the effect of the amnesty proclamation of May 29, 1865. (Stat. at Large, vol. xiii, p. 758.) The property of these persons was then liable to seizure, and it was the duty of the Treasury agents to take possession of it under the act of March 12, 1863, as amended by the act of July 2, 1864.

We do not discuss the question whether this cotton was in fact abandoned, captured, or confiscable, because that point was not passed upon or considered by the court below. That there were sufficient grounds to justify the seizure is shown by the protest of the Treasury agent against its release, and by the certificate accompanying the vouchers. (Record, p. 3.)

These acts of Congress certainly conferred upon the Secretary of the Treasury and his agents full authority over the general subject-matter of seizures of this character.

We must next look to the regulations of the Treasury Department to see how far this contract was authorized. The regulations in force at the time this contract was made provide as follows:

"I. The regulations relative to abandoned, captured, and confiscable personal property will be carried into effect by the same agents and under the same supervision as are provided under the regulations concerning commercial intercourse.

"ASSISTANT SPECIAL AGENTS IN EACH AGENCY.

"II. There shall be assigned to each special agency such number of assistant special agents as may be necessary, who, with the supervising special agent, *shall collect and receive all abandoned, captured, and confiscable property*, except such as has been used or was intended to be used for waging or carrying on war against the United States, viz: arms, ordnance, ships, steamboats, or other water-craft, and their furniture, forage, military supplies, and munitions of war.

"ABANDONED, CAPTURED, AND CONFISCABLE PROPERTY DESCRIBED.

"III. Abandoned property is that which has been or may be deserted by the owners, or when the lawful owners thereof shall be voluntarily absent therefrom and engaged, either in arms or otherwise, in aiding or encouraging the rebellion.

"Captured property is that which has been or may be seized or taken from hostile possession by the military or naval forces of the United States.

"Confiscable property is that which is liable to confiscation under the act of July 17, 1862."

* * * * * * * * *

"CONTRACTS FOR COLLECTION AND DELIVERY OF PROPERTY.

"X. When property is liable to be lost or destroyed in

consequence of its location being unknown to the special agents, or from other causes, and parties propose for compensation to collect and deliver it into the hands of such agents at points designated by them, supervising special agents may contract, on behalf of the United States, for the collection and delivery to them of such property in their respective agencies, on the best possible terms, not exceeding twenty-five per cent. of the proceeds of the property, which percentage must be full compensation for all expenses, of whatever character, incurred in collecting, preparing, and delivering such property at the points designated. Prior to any such contract being made, the party proposing must submit, in writing, a statement of the kind and amount of property proposed to be collected, the locality whence to be obtained, and all the facts and circumstances connected with it, particularly as to its ownership. And any contract made in pursuance of this regulation must be in writing, and restricted to the collection and delivery of particular lots at named localities; or, when circumstances clearly justify it, to the general collection and delivery of all abandoned property in limited districts not greater in any case than one parish or county, and not more than one district to be assigned to one contractor.

"Before payment to any contractor under any contract made in pursuance of this regulation, he shall execute a bond, with penalty equal to the amount stipulated to be paid to him, and with sureties satisfactory to the supervising special agent, indemnifying the United States against all claims to the property delivered on account of damages by trespass, or otherwise occasioned by the act or connivance of the contractor, and against all claims that may arise on account of expenses incurred in the collection, preparation, and transportation of said property to the points designated in said contract.

"Should a case arise, in the opinion of the supervising special agent, justifying the payment of a larger percentage than one-quarter of the proceeds of the property, he will make a statement of the facts and circumstances and the reasons, in his opinion, justifying such additional al-

lowance, and refer the same to the Secretary for instructions.

"And for the purpose of getting possession of and transporting to market as much of the captured and abandoned property as possible, supervising special agents, or assistant special agents under their direction, will appoint and employ in their respective agencies, at such per diem compensation as may be judged proper, subject to approval of the Secretary of the Treasury, such local special agents and agency aids as may be necessary therefor, instructing them fully as to the execution of the duties respectively assigned to them."

* * * * * * *

"XVI. Supervising special agents, and such other persons as shall be specially authorized by the Secretary of the Treasury to receive and sell captured, abandoned, and confiscable property, will pay, or cause to be paid, out of the general fund arising from the sale of all such property received and sold by them, all expenses necessarily incurred in collecting, receiving, securing, and disposing of the same, including fees, taxes, freights, storage, charges, labor, and other necessary expenses, being careful to avoid all useless or indiscreet expenditures; and will charge each particular lot or parcel with the specific or proportionate amount of all such expenses as can be made specific or proportionate charges to each lot or parcel; and will also charge and retain, out of the proceeds of each lot or parcel, one and one-half per centum thereof, for the payment of such expenses connected with the collection, transportation, and sale or other disposition thereof as cannot be made specific or proportionate charges against each lot or parcel, or are not otherwise provided for, such as rents, compensation to clerks or other employés, auctioneers, printing and advertising, a carefully stated account of which will be kept by such agents or other persons, showing in detail all expenses paid out of this fund arising from such charge; and unless unavoidably prevented, they will take vouchers for all expenditures made under this regulation, and transmit the same with their accounts to the Secretary of the Treasury. Out of the balance, if any, of said one and one-half per centum re-

maining after defraying said expenses, the several supervising special agents, or other persons selling as aforesaid, may retain, as compensation for extra care and responsibility, a sum not exceeding three-fourths of one per centum of the amount of such sales, and with the remainder, if any, may reward extra services in the collection and care of property rendered by agents and others, in such manner, and to such amount, as may be approved or directed by the Secretary of the Treasury."

The first three sections define the duties of these agents to be to collect all abandoned, captured, or confiscable property in their respective districts.

The tenth section authorizes them to enter into contracts for this purpose.

The supervising special agent had full authority to make the contract, except so far as paying one-half of the proceeds, his discretion being limited to one-fourth. The one-half could only be allowed by the direct approval of the Secretary.

As this was the only matter which required the approval of the Secretary, it is the fair construction of the contract that this was the only matter referred to him. The claimant had a right to proceed on the basis that he should have one-fourth at all events, and one-half if the Secretary should approve of it.

The precise contingency of the cotton being released was anticipated by the contractor, and provided for in the contract. In that event he was to receive his expenses for transportation, repairing, &c. This is the very thing for which he sues.

The court below treated the case as if the action had been one to recover a fourth or a half of the net proceeds. And therefore the answer could be made, there are no net proceeds.

The claimant merely asks that the last clause of the

contract shall be executed. The cotton having been released, he asks for his expenses in securing it. We are unable to understand how the validity of the contract can be conceded and this claim be denied.

The release of the cotton is the very act which gives rise to this claim, and the court below declared that to be the very ground for defeating it.

II.

If the contract is held to be invalid for any reason, we insist that all the reasonable expenses incurred by the claimant are a just and equitable charge against the Government.

Leaving the express written contract out of the case, the facts would be, that it was the duty of the Treasury agent to seize this cotton, prepare it for market, and transport it overland to a place of shipment. All this the claimant did for him, with his consent and approval.

The principles involved in the case at bar were decided by this court in *Salomon's case*. Corn had been delivered to the quartermaster, as was supposed under an express written agreement. The defendant asserted that this agreement had expired, and that the corn had been delivered under a subsequent oral agreement, made in violation of the statute requiring such contracts to be in writing. This court said it was immaterial whether the corn had been delivered under the original agreement or not, saying: "When the quartermaster in charge receives of a person corn for the Government, gives a receipt and voucher for the amount and the price, and the Government uses such part of it as it wants, and suffers the remainder to decay by exposure and neglect, there is an implied contract to pay the value of such corn, which value may, in the ab-

sence of other testimony, be presumed to be the price fixed in the voucher by the quartermaster."

19 *Wallace R., p.* 20.

And to the same effect is the case of *Gill* vs. *The United States*, (20 *Wallace R.*, p. 517.)

In these cases the obligation of the Government was held to result from the delivery by the claimant of certain property and its acceptance by the officer; and this liability was held not to be in any degree impaired by the subsequent loss or destruction of the property.

In this case valuable services were rendered and large payments made for the benefit of the Government. The results of these services were delivered to the agent. The right to compensation then became complete. How could that right be affected by the subsequent disposition made of the property?

If a blacksmith shoes a Government horse under a contract held to be illegal for want of an advertisement for proposals, or for not having been reduced to writing, and thereupon an implied contract arises that he shall be paid the reasonable value of the service, could it be said that this right of action would be lost if the horse should die before the shoes were used?

This case is all the stronger because it is for moneys actually expended for the benefit of the Government.

The Government could not seize, prepare and transport the enormous quantity of cotton which has come under the jurisdiction of this Court without incurring great expense. In this case the claimant paid these expenses for it, and he placed in the hands of the Treasury agent the fruits of his enterprise. But he did not become the insurer as to the future results, over which he had no control. The only agreement concerning a release of the

cotton was that in that event he should be repaid these expenses. If this express agreement fails through any technical defect, we are at a loss to perceive how an implied agreement of precisely the opposite character arises.

C. F. PECK,
*Attorney for Appellants.*

JOS. CASEY,
*of Counsel.*

# In the Supreme Court of the United States.

OCTOBER TERM, 1876.

WM. H. WHITESIDE ET AL.
*vs.*
THE UNITED STATES.
} No. 94.

APPEAL FROM THE COURT OF CLAIMS.

*Brief for the Defendants.*

# In the Supreme Court of the United States.

OCTOBER TERM, 1876.

WM. H. WHITESIDE ET AL.
*vs.*
THE UNITED STATES. } No. 94.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE DEFENDANTS.

## STATEMENT OF THE CASE.

Suit for $17,356 expended by claimants in hauling, baling, and ginning cotton in Arkansas in 1865, under an alleged contract with A. B. Miller, assistant special agent of the Treasury, made at Camden, Ark., dated November 10, 1865, by the terms of which Whiteside & Co. agreed to proceed to La Fayette County and procure evidence to establish the right of the United States to cotton there, and to put the same into shipping order and transport it to Camden for a half interest in all cottons condemned; and in all cases of a release after a seizure upon sufficient evidence, Whiteside & Co. were to be repaid all expenses of transportation, repairing, &c. In November and December, 1865, the claimants did de-

liver to Miller three lots of cotton, aggregating 522 bales. January 9, 1866, two of these lots, comprising 451 bales, were seized and taken from the warehouse at Camden by General May, commanding the district, with headquarters at that place, and turned over to one Harvey, who claimed to own them. The claimants had hauled the cotton nearly eighty miles, and had rebaled it, &c., and ginned a part, for which they were never paid, but two undated vouchers were given them showing the total amount by them thus expended to be $17,356, the sum claimed in this petition. Both these accounts were certified by Miller and approved by Mr. Burbridge, supervising special agent of the Treasury. Neither of them were ever presented to the Treasury Department for payment. Upon the 28th March, 1866, Mr. Burbridge made this indorsement (omitting date and signature) upon the instrument of November 10, 1865: "Subject to the approval of the Secretary of the Treasury, the within contract is approved, so far as it conforms to the regulations of the Treasury Department for paying one-fourth of the cotton condemned, and it is recommended that one-half be allowed." (Record, 6, 7.) The petition was filed December 21, 1871, and in addition to their general denial the defendants pleaded the statute of limitations. (Record, 5.) The Court of Claims, upon the facts found, ruled as matter of law—

"1. That the contract relied on by the claimant, not being approved by the supervising special agent of the Treasury, was incomplete, and no benefit having resulted to the Government from its alleged fulfillment, there is no legal or equitable ground for recovery.

"2. That, if the contract was valid, the loss to the claimants was caused by the illegal seizure of General May, and for that the Government is not liable."

BRIEF.

I.

There was no contract between Whiteside & Co. and the United States. The assistant special agent of the Treasury had no power then to make the one presented in the record. The last section of the act of July 2, 1864, c. 225, § 11, authorized the Secretary of the Treasury, with the approval of the President, to make such rules and regulations as were necessary to carry out its provisions. Under the prior act of March 12, 1863, c. 120, regulations had been promulgated September 11, 1863, which provided (Article XII) that supervising special agents might contract with persons to collect cotton for a compensation of not more than 25 per cent. *of the proceeds*, "which percentage must be in full compensation for all expenses, of whatever character, incurred in collecting, preparing, and delivering such property at the points designated." It required a preliminary statement of the cotton to be seized and a bond from the contractor; and only empowered the agent, if he saw cause, to recommend a larger allowance, which could only be made by the Secretary of the Treasury. The next article (XIII) declared "nor shall any liability be incurred or assumed, *or contract be made*, on the part of the United States by such agents, except as authorized by these regulations."

These regulations were superseded by those issued July 29, 1864, which were the *general* regulations in force when this alleged contract was made, modified only in certain respects, still further limiting the powers of these agents, by subsequent instructions and circulars.

Article XII of the prior regulations was substantially reproduced in Article X of these regulations of July 29, 1864, which was as follows:

"*Contracts for collection and delivery of property.*

July 29 1864

"X. When property is liable to be lost or destroyed, in consequence of its location being unknown to the special agents, or from other causes, and parties propose, for compensation, to collect and deliver it into the hands of such agents at points designated by them, supervising special agents may contract, on behalf of the United States, for the collection and delivery to them of such property in their respective agencies, on the best possible terms, not exceeding 25 per cent. of the proceeds of the property, which percentage must be full compensation for all expenses, of whatever character, incurred in collecting, preparing, and delivering such property at the points designated. Prior to any such contract being made, the party proposing must submit, in writing, a statement of the kind and amount of property proposed to be collected, the locality whence to be obtained, and all the facts and circumstances connected with it, particularly as to its ownership. And any contract made in pursuance of this regulation must be in writing, and restricted to the collection and delivery of particular lots at named localities; or, when circumstances clearly justify it, to the general collection and delivery of all abandoned property in limited districts not greater in any case than one parish or county, and not more than one district to be assigned to one contractor.

"Before payment to any contractor under any contract made in pursuance of this regulation, he shall ex-

ecute a bond, with penalty equal to the amount stipulated to be paid to him, and with sureties satisfactory to the supervising special agent, indemnifying the United States against all claims to the property delivered on account of damages by trespass or otherwise, occasioned by the act or connivance of the contractor, and against all claims that may arise on account of expenses incurred in the collection, preparation, and transportation of said property to the points designated in said contract.

"Should a case arise in the opinion of the supervising special agent justifying the payment of a larger percentage than one-quarter of the proceeds of the property, he will make a statement of the facts and circumstances and the reasons in his opinion justifying such additional allowance, and refer the same to the Secretary for instructions."

Article XIII of these regulations was identical with the same article of the regulations of September 11, 1863, in its declaration, "Nor shall any liability be incurred or assumed, *or contract be made, on the part of the United States by such agents except as authorized by these regulations.*"

By circular-letter of June 27, 1865, all the power of the Treasury agents to collect cotton, except that already captured by or surrendered to the forces of the United States, was to terminate with the month of June, 1865; and by circular-letter of July 22, 1865, from the Secretary of the Treasury to the supervising and special agents of that Department, the making of such a contract as that in this case was expressly forbidden.

A new series of rules was issued August 18, 1865. The sixth was this:

"6. Supervising agents will not collect directly, *nor make any contract for collecting*, but will receive and forward to Simeon Draper, cotton-agent, New York, until otherwise ordered, all that shall be sent to them by assistant agents, and will give duplicate receipts for each lot, as above indicated."

The next rule is as follows:

"7. Each assistant agent will be assigned to duty in a well-defined district by the proper supervising agent, and will therein make contracts, in all cases where it can be done, with the planter or other person in whose custody the captured cotton shall be found, to prepare in proper packages and condition for transportation, and deliver the same at such place of shipment as shall be agreed upon. The terms of these contracts, when made with planters having custody of the cotton, should be sufficiently liberal to insure fair compensation to them, and to encourage good feeling on their part. *Each contract must be made in writing, and be for the delivery of a specific lot at a designated place, and be made subject to the approval of the supervising agent* under whom he is acting. *Compensation must be made under such contracts out of the cotton delivered upon them*, and must be made only by the supervising agent who receives the cotton."

The contract set up in this case, not being with the planter or person in custody, nor for any specific lot in any designated place, nor otherwise agreeing with the rule last above quoted, it is evident that it was made under the earlier regulations, although it does not at all conform to their requirements. A comparison of this paper with any system of rules or regulations ever promulgated by the Secretary of the Treasury shows

that it was always beyond the power of the Treasury agents to contract upon the terms contemplated in this document.

The contract was an entire one. If beyond the power of the Treasury agent to stipulate with the claimants for a half interest, then the incidental provision, as to expenses, &c., must fall with the rest of the contract. But it was equally beyond the power of that officer to make any such stipulation as to expenses, and thereby bind the United States.

II.

The attempted contract never was completed. It was made subject to approval, and not approved till long after the expenses had been incurred and the cotton seized. The minds of the contracting parties never met in assent to any certain and definite proposition. Mr. Miller could not make any contract, except subject to the approval of the supervising special agent. The memorandum made between him and the claimants must be considered as made subject to this approval, or it was void *ab initio*. He was asked to approve a contract for a half interest, for which Whiteside & Co. agreed to render the service. After the seizure by General May had rendered its complete execution according to its terms impossible, General Burbridge approves it for a quarter interest; but Whiteside & Co. never proposed to do the work for this proportion of the cotton. True, General B. "recommended that one-half the cotton be allowed;" but this recommendation never was acted upon, and the whole of the cotton was "*non est inventus*" before it was made. It required on

its face, to perfect it, an approval that it never received. Even General Burbridge did not approve of that clause upon which the present claim is based, but only of an agreement (never made) to pay a quarter of the cotton condemned, which would be all that the Treasury regulations would allow.

III.

Even according to the terms of the contract of November 10, 1865, (if valid,) the claimants are entitled to nothing. It stipulated that they were to have one-half of the proceeds of all cotton "so recovered and *condemned.*" None was recovered and ondemned; so they claim nothing under this provision.

The next sentence is, "and in all cases where the cottons are *released*, after the seizure, being made upon sufficient evidence to warrant the same, said Whiteside & Co. will be repaid for all expenses," &c. (Record, 6.) Under this they made their claim. To recover, two facts should have been proved by the claimants, which, without proof, this court cannot assume to exist, and one of them is expressly negatived by the evidence and findings, viz: 1st, that the cotton was "*released*" *by the United States;* and, 2d, that the seizure was "made upon sufficient evidence." Both these things must concur to entitle the other contracting party to be paid their expenses by the United States. If the cotton was neither condemned nor released by the United States, but perished by fire or flood, or was forcibly and wrongfully taken from either party to the contract before opportunity was given to condemn or release it, then each party bore the loss that thereby befell; the Government lost the cotton, and Whiteside & Co. their ex-

penses. If seized without "sufficient evidence" to justify it, then Whiteside & Co. were, very properly, to lose those expenses, which were attributable to their own unjustifiable conduct.

Upon what evidence, sufficient or insufficient, they made the seizure of the cotton in question does not appear; nor why it was taken by General May and delivered to Mr. Harvey, except that the seizure was not warranted by the facts. It does not appear that it was "captured" cotton or "abandoned" cotton.

The term "release" evidently means a restoration to the party entitled, made by the Government, through the proper agent, to whom the law gives the power of determining the rights of the claimant and of the United States.

IV.

The defendants are in nowise responsible for General May's unlawful act. (Story on Agency, § 307, *a*; Lee *v.* Munroe, 7 Cranch, 366; The Floyd Acceptances, 7 Wallace, 676–681; Baltimore *v.* Eschback, 18 Md., 282; Baltimore *v.* Reynolds, 20 Md., 1; State *v.* Hayes, 52 Missouri, 580; Hull *v.* Marshall Co., 12 Iowa, 142; State *v.* Hastings, 10 Wis., 518.) His return of the cotton (if captured or abandoned) was in direct violation of the act of March 12, 1863, c. 120, § 6; 12 Stats., 821; act of July 2, 1864, c. 225, § 10; 13 Stats., 378.

V.

The tort of General May cannot be the basis of a claim here. (Gibbons *v.* United States, 8 Wallace, 269.) But it was that tort, *preventing an execution of the contract*, that caused all the injury which the claimants suffered. It was a tort injurious (or at least not beneficial) to the United States.

VI.

The statute of limitations, seasonably pleaded, (Record, 5, folio 9,) is a bar to this claim. The contract bears date November 10, 1865. The expenses were incurred in that and the succeeding month. (Record, 6, bottom.) The claim was filed December 21, 1871. If any portion of the expenses were incurred subsequently to the 21st December, 1865, it was incumbent upon Whiteside & Co. to prove this fact and the amount. Indeed, they have not proved that they have hauled *any* cotton, or incurred *any* expenses, at any time. It was no part of the duty nor within the power of the Treasury agents to make *ex-post facto* admissions for the purpose of binding the United States. (7 Cranch, 366.)

VII.

No services have been rendered to the United States by Whiteside & Co., and no charges can be made by them against the Government.

EDWIN B. SMITH,
*Assistant Attorney-General.*

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